UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - X

ISRAEL WEINGARTEN,	:	14-CV-5738(JG)
Petitioner,	:	U.S. Courthouse Brooklyn, New York
-against-	:	TRANSCRIPT OF ORAL ARGUMENT
UNITED STATES OF AMERICA,	:	January 30, 2015 12:00 p.m.
Respondent.	:	

- - - - - - - - - - - - - - - X

BEFORE:
HONORABLE JOHN GLEESON, U.S.D.J.

APPEARANCES:

For the Petitioner: TODD W. BURNS, ESQ.
RICHARD M. LIPSMAN, ESQ.
JODI D. THORP, ESQ.

For the Respondent: LORETTA E. LYNCH, ESQ.
United States Attorney
271 Cadman Plaza East
Brooklyn, New York 11201
BY: JENNIFER S. CARAPIET, ESQ.
SHREVE ARIAIL, ESQ.
Assistant U.S. Attorneys

Court Reporter: Holly Driscoll, CSR
Official Court Reporter
225 Cadman Plaza East
Brooklyn, New York 11201
(718) 613-2274

Proceedings recorded by mechanical stenography, transcript produced by Computer-Assisted Transcript.

THE COURT: State your appearances please.

MS. CARAPIET: Good morning, Your Honor, Jennifer Carapiet for the United States.

MR. BURNS: Good morning, Your Honor, Todd Burns on behalf of Mr. Weingarten. I'm also here with Jodi Thorp and Richard Lipsman.

THE COURT: Hi. Welcome to all of you.

This is the oral argument on Mr. Weingarten's application pursuant to Section 2255 of Title 28.

You want to be heard, sir?

MR. BURNS: Yes, Your Honor. There are a few points that I'd like to emphasize with respect to the motion to strike declarations because that's an issue that we didn't file a reply on. I'd like to start by making clear that we, of course, recognize that implied waiver applies in this context. What we really disagree on is whether or not the declarations that have been submitted are, as the government has indicated, narrowly tailored. We don't think that they are at all.

My concern back in September, and looking back over the record of this case and the previous declarations, was that if future declarations were submitted, that they might well not be narrowly tailored. That's why I reached out to Mr. Rhodes and Mr. Stutman and asked them that we pursue sort of a controlled process here. You know, among other things,

it seemed apparent to me that there's some acrimony there and that creates, you know, a potential conflict and I thought it was better that we be involved in that process and that the Court be involved in that process, if appropriate, and that's not what happened. I think that these last batch of declarations, particularly Mr. Rhodes's, are even more problematic and, you know, the main District Court case that the government has relied on in its papers is Giordano. I was looking at that last night and actually I think Giordano pretty much, about 80 or 90 percent supports our position.

In that case the government went to the court and asked the court to find an implied waiver. I presume that that was probably because there had been some restraint on the part of former counsel saying, well, held on a second, you know, I've got some ethical obligations here. The government went to the court, the court in addressing the situation agreed with the Ninth Circuit's opinion in Bittaker, set up some boundaries, said basically, if necessary, you can come back to the court but I'm not going to supervise every interaction and said that before anything is publicly filed, I'll enter a protective order as appropriate. That's pretty much what we think should have happened here and what didn't happen and that's the reason for the motion to strike.

On the -- I don't know if the Court wants me to move on to other issues.

THE COURT: Yes, please.

MR. BURNS: On the other issues, you know, there's some things I could emphasize in various contexts but I think there's been a lot of paper so there's not a lot that I need to cover that I don't feel has already been covered.

There is another point that occurred to me, again last night in looking through the papers, and that was in the context of the statute of limitations and the retroactivity; one of the government's main arguments is that the first nine words or so of 3283 indicate Congress's intent that the amendments apply retroactively and basically what they're saying is that that language not only indicates that, you know, this is the statute of limitations that controls but it also controls over its predecessor and that language is no statute of limitations that would otherwise preclude prosecution for an offense involving, etc., etc.

I went back and I looked at the first version of that statute in 1990 which was at that point at 3509(k). It's the same language when there was no predecessor statute. So, obviously Congress in using that language wasn't meaning to say this statute of limitations doesn't apply to its predecessor because there was no predecessor. What it was meaning to say is that it controls over other statute of limitations presently. You know, there are other, of course, good arguments as to why that argument, the government's

argument doesn't work there. I think the strongest one is if you look in these other contexts that I've cited with the terrorism offense statute of limitations and the financial crimes, Congress knows exactly how to say when it wants the statute of limitations to apply retroactively, it says it explicitly and clearly, including with the terrorism statute a year before the amendment in this case.

So, you know, that's pretty much the only new thing I have to add. Again, there are several points of emphasis that I'd make and one of them I think that was pretty compelling is if you look at the unprepared counsel, ineffective assistance claims, even if you accept what Mr. Rhodes and Mr. Stutman are saying, there are just some things there that really, you know, are inexcusable, not going to the Brooklyn apartment and interviewing the people there and looking at the scene, taking photographs, and I would say not going to Belgium too, but the Brooklyn one is such an obvious one, I mean it's two miles away; not doing anything about the repentance letter which is just such a bombshell that's dropped in the middle of trial and, you know, ends up getting into the record and creating a real problem and that's the first thing the jury asked to see, where they should have been on top of that and prevented it from the outset. Apparently what happens at trial, they haven't even read it, they don't realize what's there. Not consulting with any

experts, not talking to any witnesses; some of these witnesses are apparent just if you look at the Family Court records, including witnesses in Belgium.

So, you know, there are just some things here that, even if you take everything in the two attorneys' declarations as true, that are really inexcusable and I think that that point is made very well in the declaration we submitted from David Kirby. Let's stay out of the disputes here and it's still a real mess what they did as far as the preparation.

So, again, I don't want to go over all the stuff that I filed. If the Court has questions on any specific issues, I'd be happy to answer it but other than that, I'll submit.

THE COURT: Doesn't the breadth of the implied waiver vary with the breadth of the accusation or allegation of ineffective assistance?

MR. BURNS: Sure, I think it is based on the circumstances and I think because of that and because it is inexact and because of the interests that are involved, what Bittaker recommends which really makes a lot of sense and, you know, what Bittaker recommends is sort of encompassed in that order that I submitted from the Central District of California which was drafted by government counsel which is you sort of work out, okay, well, these are the allegations, this is what former counsel thinks that they need to say to rebut them and

then at that point when that's been carefully done, if the defendant wants to, he can withdraw a claim so as not to have that waiver implied. It seems to me perfectly sensible. Would it need to be done in every case, no, but I think in a case like this when you have the obvious conflict between client and former counsel, that proceeding with care is advisable and following that sort of process.

You know, if I felt like the declarations were in bounds, I wouldn't be wasting the Court's time with this but I feel like there's some parts of those declarations that are just to me far out of bounds. You know, we can only sort of judge things based on our own judgment. Different people may look at them and have a different view but to me it's not close.

THE COURT: All right. Thank you.

MS. CARAPIET: Your Honor, I'll first address the issue of the implied waiver in the affidavits and then move on to the merits.

THE COURT: Yes.

MS. CARAPIET: If defense counsel actually feared prejudice or harm with respect to the disclosures that the attorneys in this case were bound to make, they should have applied to the Court or the government earlier in this case and the fact that they've waited until this late date just reflects the lack of harm or prejudice here. They're

essentially asking this Court to adopt a procedure that has not been adopted in this circuit. The Second Circuit is a case specific circuit and they look at the implied waiver in this circuit and then determine how much the attorney should be able to respond and the Second Circuit has primarily left that up to the government and the attorneys who tried the case at trial because they're best suited to make those calls.

In this case the defendants have essentially conducted a smear campaign of these attorneys. They've raised every sort of conversation and detail that these attorneys have ever brought forward between the client and attorneys or in court and they've essentially destroyed these attorneys from head to toe and are now trying to silence them. When you have disclosures as broad as this, it actually begs a broader reply than the attorneys in this case provided.

Mr. Rhodes' and Mr. Stutman's affidavits march through the claims one by one, they track the language in the claims made by the defendant in this case. They are by no means going into excessive rabbit holes or topics that haven't been raised by the defendant's petition. To try to silence them at this stage is just a useless application and it is unfair in light of what the defendant has done to these attorneys.

Moving to the merits of the petition, we would just remind this Court that habeas is an extraordinary remedy to be

used in exceptional circumstances. It is not warranted in this case. The defendant has essentially taken a kitchen sink approach to habeas. He's thrown every claim he can think of at the Court in hopes that something will stick but nothing does. He's raised no colorable factual or legal questions and as such, his petition should be denied in full, his conviction and his sentence should remain undisturbed.

He basically offers five defaulted claims and then an ineffective assistance and an actual innocence claim in an attempt to excuse those defaults. The ineffective assistance and the actual innocence claims do not meet the rigorous standards required by law. The actual innocence claim is essentially a multi-year campaign by the defendant to raise some question about his guilt. He's cited examples of innocent behavior, times when his alibi was at work and he's asking this Court to infer a pattern of innocence from that. That is improper and based on the jury's finding beyond a reasonable doubt that there was a pattern of abuse, the defendant hasn't moved the needle. To show that he is probably innocent is an incredibly high bar and he simply hasn't done so. His petition says that it is only likely that this mountain of evidence makes him innocent. That's hardly a resounding endorsement of an innocent man.

He also hasn't proven ineffective assistance of counsel; in other words, he hasn't shown that his counsel was

objectively unreasonable in the circumstances that they faced in 2008. They're imputing 20/20 hindsight in their evaluation of trial counsel but here these were effective attorneys who were thorough in their representation and having spoken to other AUSAs in the office who have repeatedly interacted with particularly Mr. Rhodes, they have nothing but thorough comments to make about these attorneys being good representatives of their clients.

In this case it was a he said/she said at bottom and to focus on the first type of evidence in a he said/she said case means looking at the victim's allegations of core abuse and the defendant's own rebuttal of that. These attorneys focused on that, they sought information and testimony from the victim in earlier Family Court depositions in order to try to impeach her core claims of abuse.

They also prepared the defendant rigorously for his testimony, the he said portion of the case. The rest of the things that might be found by defense counsel in this case are peripheral and circumstantial and that's precisely what the defendant is now offering this Court, peripheral and circumstantial evidence.

The attorneys at trial did try to make efforts at obtaining that type of evidence but they were frozen out by the Satmar community and they were denied information by the defendant. Notably, under Strickland, to the extent that the

defendant denies information to his attorneys, the reasonableness of an investigation is directly correlated to that. The recent emergence of Satmar witnesses and responsiveness of Satmar locations of crime say nothing about the conditions that counsel faced in 2008. At that time, instead of cooperating and dealing with the reality that this trial was going to happen, the Satmar community and the defendant alike were trying to make the trial stop. They were besieging this Court with letters pleading that the case go away and they were ignoring all reality when it came to preparing for the case at bar.

It is only after the damage has been done, after the defendant has been convicted, after the stain has been put on the Satmar community reputation that these people are coming forward for a second bite at the apple on direct appeal, for a third bite at the apple now, but those changed circumstances indicate exactly why we cannot impute the success that counsel contends they've had today onto counsel in 2008.

Additionally, the specific reasons that they have said that counsel are ineffective here do not hold water. The five claims that they've offered on their core lack merit and so counsel were not ineffective for failing to bring them earlier.

We would contend that this Court has already dealt with the constitutionality of this defendant's pro se

election, his competency, the voluntariness and constitutionality on both of those ends so we won't reiterate that here.

In terms of the statute of limitations, they're making a great to do about something that is very simple. The defendant was timely indicted under the correct statute of limitations. Section 3283 is the statute of limitations for child sexual abuse cases and it was properly applied to this child sexual abuse case. The thrust of this case is that the defendant raped his daughter and that he trotted her around the globe in order to do this. It is the most perverse sexual abuse case that you can devise and to apply any other statute than the child sexual abuse statute of limitations would be a perverse outcome. This case is precisely what Congress intended be ensnared by this statute of limitations and to suggest that a five-year statute of limitations is applicable here is absurd. That would allow people like the defendant to manipulate and abuse their children at an age when their children do not even have the proper vocabulary to come forward and continue to abuse them and then the child might turn 10, 12, 13 years old and suddenly the claim against them is expired. That's why Congress enacted 3283 for cases like the defendant.

The Bridges analysis does not apply here. That case is about a wartime statute. It is a suspension of a tolling

provision. It's not a proper statute of limitations on its face. Congress's intent in enacting it was narrow and it was for wartime purposes only. It was not for the broad ensnarement of a general category of cases which is what we have here. So, the defendant's arguments there are inapposite.

And regarding the amended version, the 2003 version clearly applies. As defense counsel pointed out, the statute is clear on its face in saying no other statute of limitations shall preclude prosecution. At the original enactment that was to encompass all other statute of limitations on the books that might preclude prosecution and that continues to be the case and now that just blankets in the predecessor statute.

Congress knows how to list offenses that are involved in a statute. When you go to Title 18 and look at the statutes of limitations there, very often Congress says offenses involving violations of, and they enumerate the statutes that they cross-reference. Here they left it intentionally broad. They knew that there were statutes and violations of law that could be colored as a child sexual abuse case or another type of case and they wanted to ensure that they ensnared all of the sexual abuse varietals.

In this situation the 2003 amendment Congress stated was enacted precisely for cases like this one. They precisely said that in the event that a case is being investigated and

is cracked after the victim's 25th birthday, it would be unfair and unjust to let the defendant get out on that technical loophole. That's exactly what the defendant here is trying to do and this Court should not permit it.

That's all that the government has at this time but we're happy to answer questions on any of those points.

THE COURT: All right. Thank you.

Anything further from you?

MR. BURNS: If I may respond to some of those points?

THE COURT: Sure.

MR. BURNS: Regarding the implied waiver and the delay, I mean, you know, I wrote to former counsel, they're the ones that had the ethical obligation before they did this, I don't really think that I can be faulted for having delayed. I think that was actually pretty good foresight, you know, if I may say immodestly.

The kitchen sink approach argument; what the government claims is a whole bunch of different claims is actually a whole bunch of evidence that show that these two attorneys weren't prepared and the reason I go through all of these hearings is because at each hearing they demonstrate that they're not prepared and what better evidence that they're not prepared than what's said on the record. I mean they can dispute what Mr. Weingarten says, what

Mr. Weingarten's supporters say, but they have a much harder time disputing what they say on the record and, you know, if you go through that record, there are lot of things but one thing that I think is worthwhile pointing out; the Court, of course, takes their representations at the time that they are prepared and that they know the case at face value and I don't believe that that was true and I think one interesting point that I noticed, just because the government brought it up in their brief, is with respect to -- it was I believe the November bail hearing, it was on November 19th, one of the things that Mr. Stutman said there is, oh, I've been reviewing records of these proceedings from 1999 to 2003, and one of the things the Court relied on in its order in finding that they were prepared is Mr. Stutman said he had been reviewing the records and one of the things that the government cites in its brief said the Court already found that they're prepared and quotes this portion.

Well, there weren't Family Court proceedings in 1999. That was Mr. Stutman being mistaken because he didn't know the core facts and those mistakes became even more apparent at the next hearing, December 15th, when Mr. Stutman starts talking about complaints in Family Court proceedings in 1993. He doesn't know the facts because he hasn't reviewed the records. He doesn't know the basic dates of when important things happened. I mean these Family Court

proceedings in the background are hugely important to understanding what's going on in this case.

So, I get faulted for going through the record and pointing out the evidence but it's the evidence. Those aren't the claims, it's the evidence that these attorneys were unprepared, and I don't really think it would be appropriate for me to hold back on pointing out that evidence. It is exhaustive, yes, but it is important.

The government also begins with the actual innocence claim and says, you know, these are minor arguments or peripheral, peripheral matters. I mean these are a dozen witnesses at the crime scene in Belgium who are saying she wasn't locked up in the house all the time, I remember seeing her because it was right after Mr. Weingarten's father died and they were coming back to clean up the apartment, she wasn't locked up in the apartment, she seemed fine, she came over her house several times for dinner, Mr. Weingarten was going to synagogue regularly as he always does. I mean these are, as the Second Circuit said, pretty much alibi witnesses. I mean Linstadt and Pavel make clear that these are key important witnesses with compelling evidence. To characterize it as peripheral is just to me astounding.

And then the Brooklyn apartment, again you have people right there on the scene in a small apartment in a short period of time where these events supposedly happened.

I mean these aren't peripheral witnesses, these are key compelling witnesses. And, you know, you also, of course, have Feige Weingarten saying to her husband, her subsequent husband after Israel Weingarten that they had made up -- her daughter had made up claims against her husband.

I mean this is a lot of important evidence but, you know, the actual innocence claim is really far down the line of the claims because I realize that's the harder one to win on. There are a lot more compelling claims here than that. That it's chosen first to be addressed by the government I think suggests that they have problems with some of the other claims which they, of course, do.

I believe there was a reference in there to these lawyers' former clients or their reputations. I don't know that we have any evidence on that other than Canales and Canales is a pretty disturbing case that it is hard not to see some parallels with this case regarding just completely not knowing the facts, not doing any investigation and then after the fact blaming your client for what you didn't do.

You know, it's interesting because one of the things the government says in its papers is, well, an attorney doesn't have to be a puppet for their client and that's true but the client also can't be held to the standard of being the puppeteer and there's a lot of claims here that, oh, Mr. Weingarten didn't do this, Mr. Weingarten didn't do

that. Mr. Weingarten was detained. These attorneys had basic obligations. They had obligations to go to the crime scene two miles away and check it out. They had obligations to find investigators, they had obligations to find witnesses and, again, some of these witnesses and some of these key witnesses including Josef Chaim Cohen and Liba Berger in Belgium are referenced in the deposition of Frieme Leaieh Weingarten in the Family Court proceedings.

You know, a lot of these witnesses even if they didn't talk to Mr. Weingarten at all, they could find them. And Mr. Cohen, he was sort of our gateway to everyone we needed to talk to. He was a close friend of Mr. Weingarten's, he knew all the people we needed to talk to in Belgium. Ms. Thorp went over to Belgium, it was very easy to find people. Mr. Lipsman went before her, it was very easy to find people. Mr. Lorandos found almost all these people and got declarations from them in the few weeks following trial. I mean it just strains credulity to think that Mr. Weingarten and everyone else were hiding all of these witnesses from these two attorneys until after the trial, but that could be a subject of an evidentiary hearing.

But I don't think the Court even needs to get there because just based on what these two gentlemen claim, they just didn't do their job, they didn't investigate the case and there was so much there that could be found. And, you know,

that ties back, this recent emergence of these issues, this isn't a recent emergence. These witnesses were found and submitted declarations in 2009 within a few weeks or eight weeks after the trial, so this is not some recent cooked up thing and to suggest, oh, this is just some long-standing process where Mr. Weingarten keeps coming back and raising new stuff, I mean that's not accurate either, he's said this all along and this is finally his 2255 proceeding where he can litigate these claims and that's what he's doing and to suggest that they're barred is astounding to me too. I mean the fact of whether or not the attorneys were unprepared is an ineffectiveness issue which the Court specifically said should be litigated now.

Regarding the statute of limitations issue, I note that the government counsel didn't say anything about the retroactivity issue, of course. I mean it just seems to me that one is so clear when you have the statements in other contexts specifically saying this statute of limitations is to be retroactive, but they do say something about the categorical approach and they say Bridges doesn't apply but Bridges is a categorical approach case. I mean I was a little bit surprised, I kind of thought the categorical approach had grown out of Taylor but, lo and behold, it goes back at least as far as Bridges and that's what they're applying and they say, look, it's involving an offense.

You look at what the statute requires, not what's charged. They specifically say that, you don't look at what's charged in the indictment, that's a categorical approach, that's just what it is. And as we all know, the categorical approach is, you know, writ large in the federal criminal justice system, it comes up in every context probably in, you know, 50 percent of the cases at least, in immigration, in criminal, all over the place, you know, in deciding whether or not the crime is a crime of violence in the Bail Reform Act or whether or not it's appropriate to charge someone in the Juvenile Delinquency Act, it's everywhere in all types of offenses.

And the key language in this statute of limitations are "offense" and "involving." Leocal makes clear "offense" denotes a categorical approach. James and Nijhawan make clear "involving" denotes a categorical approach. Once that issue is decided that it's a categorical approach, the government doesn't even make an argument that these two offenses qualify if you conduct a categorical approach.

So, it seems to me that both the statute of limitations issues are very, very strong and I don't have anything further, Your Honor.

THE COURT: Thank you. Thank you both for your advocacy.

The petition is denied. There's a lot that's been said in this petition. There's some granular detail that's

the product of a fine tooth comb examination of the record but really in its essence there's not a whole lot that is said that hasn't been said before and there really isn't a whole lot for me to say in response to it that I didn't say in my May 8th, 2009 memorandum and order.

It is a very unusual case in a lot of respects. Chief among them generally is the decision to go pro se but chief among them for purposes of many of the arguments that have been advanced here is a phenomenon that's even more unusual than the defendant's decision to represent himself at trial and I referenced it briefly on page 12 of that memorandum and order I just referenced and that is what I refer to as this off stage force that the defendant described as his people, and I won't repeat what's there, you've read it, you've obviously carefully gone over the record, but I had no doubt at the time and I have no doubt now that that made the representation, that the influence of these unseen folks that Mr. Weingarten referred to as his people made the representation of Mr. Weingarten especially difficult, uniquely difficult and there's a recitation of some of the examples of that in the memorandum and order.

I don't think an evidentiary hearing is warranted at all. I don't think there was ineffective assistance. I think the government has it right on the statute of limitations arguments on the merits. And I also think it's true that

there's some deference to be accorded to the decisions made by trial counsel who were placed in the crucible by the way their client himself chose to arrange his defense with all these unseen folks and I remember to this day them having to walk outside because there's supposed to be defense witnesses that Mr. Weingarten's people were going to provide but they weren't in the hall. This case was a nightmare for defense counsel.

Only someone who sat in this courtroom during this trial could fully appreciate what I have to say briefly on the actual innocence assertion here. I don't think anybody in the well of this courtroom except me sat through this trial. It's not always the case that trial judges and the people who are present when testimony is given have a real peculiar advantage over those who read the cold record, sometimes they don't, sometimes they do, and anybody who sat through that trial has an advantage that in my 30 years in the criminal justice system is unmatched in any other case.

It is a very difficult standard, this actual innocence standard, new reliable evidence that wasn't presented that shows more likely than not that no reasonable juror would find the defendant guilty beyond a reasonable doubt. You could cut the tension in this courtroom with a knife. I'll go to my grave remembering the victim witness' reaction the first time her father uttered on cross-examination the name Frieme Leaieh and

you're just going to have to find some other judge than me to ascribe any weight whatsoever to your actual innocence claim.

I have no doubt that the defendant and his people and his new lawyers can find people in Belgium who will provide information that might suggest exculpatory evidence. I'm not buying it. I sat through the testimony, heard the government's evidence. I'm not buying it. I think in every dimension these motions, including the motion to strike the challenged attorneys' declarations have no merit whatsoever; so, I'm denying the motion to strike, I'm denying the petition under Rule 2255 there being no substantial showing of a deprivation of a federally protected right. No certificate of appealability shall issue.

Have a good day.

MR. BURNS: Your Honor, may I just address one other thing?

THE COURT: Yes, you can quickly.

MR. BURNS: I referenced in my argument that Frieme Leaieh's deposition mentioned two witnesses. I don't believe that that's been lodged with the Court. Is it acceptable if we lodge that with the Court in the next couple of days?

THE COURT: You can file an application to supplement the record and I'll hear from the government.

MR. BURNS: It basically --

THE COURT: It sounds fine to me but I have to give the government the process it is due.

MR. BURNS: Okay. And there's not going to be a written order that will issue, am I correct about that?

THE COURT: No, I just denied your applications.

MR. BURNS: Thank you, Your Honor.

THE COURT: Thank you.

MS. CARAPIET: Thank you, Your Honor.

(Time noted: 12:25 p.m.)

(End of proceedings.)